

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, et al.,

Plaintiffs,

v.

05 Civ. 8136 (DC)

GOOGLE, INC.,

Conference

Defendant.

New York, N.Y.
July 19, 2011
10:00 a.m.

Before:

HON. DENNY CHIN

District Judge

APPEARANCES

BONI & ZACK LLC
Attorneys for Plaintiffs
BY: MICHAEL J. BONI

DEBEVOISE & PLIMPTON LLC
Attorneys for Plaintiffs
BY: BRUCE P. KELLER
JEFFREY P. CUNARD

DURIE TANGRI LEMLEY ROBERTS & KENT LLP
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BY: DARALYN DURIE
JOSEPH C. GRATZ

HILARY E. WARE
In-house counse for Defendant

1 (Case called)

2 THE COURT: Good morning. You can be seated. Who
3 wants to give me a report?

4 MR. BONI: Your Honor, Michael Boni. I'm happy to.
5 Since we were last here, the parties have been working
6 diligently. We have had regular telephone calls. A number of
7 certain parties within the three groups have had in-person
8 meetings. As recently as Monday we had a very high level
9 meeting among principals.

10 We are not there yet, your Honor. As your Honor
11 pointed OUT at the last status conference, there are very
12 complicated, complex issues that require us to delve in. It's
13 the dog days of summer. We are doing our best. It's difficult
14 to get everybody's schedules on track.

15 What we would ask your Honor is for some more time, we
16 would hope through the mid to third week in September, to be
17 able to let your Honor know whether we have a settlement or are
18 on the way to a settlement or a litigation track.

19 THE COURT: You're not there yet. What is the
20 prognosis? Let's back up a moment. I'm a little bit
21 concerned. This is a six-year-old case. As I recall, there
22 has been no discovery done, right, nothing to speak of?

23 MR. BONI: There has been documentary discovery.
24 Unfortunately, it is now five years old and would have to be
25 supplemented. But there has been substantial documentary

17
1 discovery, your Honor.

2 THE COURT: It seems to me one thought is to put you
3 on a schedule, give you a deadline, allow a little room for
4 continued discussions, but have a deadline. I think a deadline
5 always makes the parties negotiate more efficiently, with a
6 view toward teeing up cross-motions for summary judgment. It
7 seems to me if we are on the litigation track, it's cross-
8 motions for summary judgment on whether the use of snippets is
9 fair use. I actually think that would not be that complicated.
10 That's my current thinking.

11 MR. BONI: Yes, your Honor. We understand that.
12 We're toward the end of July. Whatever we do, it is very
13 difficult for the parties, through August, to get together. We
14 are trying.

15 THE COURT: I don't doubt that. It's just a matter of
16 I have a sense you would come back in mid to late September and
17 you would probably want more time. Typically, what I would do
18 is give a discovery cutoff and let you come back at the end of
19 discovery and tell me where you are. Then in the meantime
20 continue to talk.

21 MR. BONI: I think that doing that, your Honor,
22 beginning in August on that dual track will be very distracting
23 for the parties. The plaintiffs would have to focus heavily on
24 what is essentially highly fact-specific discovery. I don't
25 believe, your Honor, that it is as simple as cross-motions for

summary judgment. The factor analysis for fair use is fact-specific. We would have to update the now five-year-old discovery. We have not taken deposition discovery.

Let me propose one thing, your Honor.

THE COURT: I guess what you are not telling me is whether you think it is likely --

MR. BONI: Yes.

THE COURT: It's been a long time. At one point Google said, we will never agree to an opt-in settlement. If that's the case, I don't know that we are ever going to get there. I want to be more productive and efficient about it.

MR. BONI: I'm not standing up here telling you that we just want to buy time but that in the middle of September we are going to be right back here and then ask for a litigation schedule. I can't give a prognostication. I don't know that before your Honor Google has said it will never agree to an opt-in settlement. That's the precise settlement that we have been aiming for, understanding well your Honor's opinion. We know that that is the confines in which we are trying to settle this case, within an opt-in structure. Google understands that full well and has understood it from the time it's read your opinion.

THE COURT: Does anyone else want to add anything? Let's do this. Come back September 15th at 11 a.m. for a status conference. If the matter is not resolved or close to

1 resolved in principle, I'm going to give you a relatively tight
2 schedule for discovery. In other words, not as if we are
3 starting from scratch but keeping in mind that it is a
4 six-year-old case. September 15th at 11 o'clock.

5 Anything else today?

6 MR. BONI: Thank you, your Honor.

7 THE COURT: I would ordinarily offer my services, but
8 given the nature of the case and the fact that there are so
9 many nonparties, I'm worried about injecting myself into
10 settlement discussions. Would the parties be interested in
11 some help from -- I don't remember who our magistrate judge
12 is -- from the magistrate judge or from someone else, a senior
13 judge? Do you think that might help?

14 MR. BONI: Your Honor, speaking for the authors, we
15 would welcome that. We do need to discuss that with the other
16 parties, but we think that would be a great idea.

17 MS. DURIE: Your Honor, Daralyn Durie. I think it
18 makes sense for us to discuss this. As the Court is well
19 aware, there are a lot of business issues in addition to legal
20 issues that we are trying to work through. I think at this
21 point it's not a problem with communication, it's just a
22 problem of trying to figure out a structure that is going to
23 make sense for all the parties.

24 THE COURT: It's not your typical settlement where a
25 judge can just knock heads.

1 MS. DURIE: Right.

2 THE COURT: Think about it. If you want some
3 assistance from us, let us know, and I can try to arrange
4 something.

5 MS. DURIE: We appreciate the offer.

6 MR. BONI: Thank you, your Honor.

7 THE COURT: Thank you.

8 (Adjourned)

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